No. 16256

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH JOHNSON WILLIAMS and FRED COOK, JR.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' PETITION FOR REHEARING.

WM. H. NEBLETT,
649 South Olive Street,
Los Angeles 14, California,

E. W. MILLER,
1127 Wilshire Boulevard,
Los Angeles 17, California,

GERALD H. GOTTLIEB,
9025 Wilshire Boulevard,
Beverly Hills, California,
Counsel for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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To the Honorable, the United States Court of Appeals for the Ninth Circuit and to the Honorable Oliver D. Hamlin, Jr., to the Honorable Gilbert H. Jertberg, Judges of said Court, and to the Honorable William J. Lindberg, Judge of the United States District Court:

I.

Status of the Case.

Appellants petition this Honorable Court for a rehearing of its decision rendered December 21, 1959. Particularly referring to appellant Williams, said decision affirmed a Judgment convicting appellant Ruth Johnson Williams on four counts of an indictment charging her in one count of the sale of heroin, in a second count of receiving, concealing and facilitating the transportation of heroin, in a third count of receiving, concealing and

facilitating the concealment of heroin, and in a fourth count of conspiring with Smith and Bryant to sell, receive, conceal and facilitate the transportation and concealment of heroin, and certain overt acts, in violation of Title 21 U. S. C., Section 174, and Title 18 U. S. C., Section 371. The Appellant Williams was sentenced to ten years on each of three of the counts, and to five years imprisonment on the fourth count, all sentences to run concurrently, together with payment of an aggregate fine of $5,000.00.

II.

Grounds for a Rehearing.

In devoting, as we do, the present Petition largely to matters relating to the legality of the arrest and of the search and seizure, antecedent to the arraignment of the Appellants, we wish concurrently to advise this Honorable Court that each and all of the several grounds the subject of appellants' previous briefs filed herein continue to be urged and maintained. It is not our wish, however, further to burden the record with argument on those points, since it is our belief that argument has amply been presented to this Court thereon.

A further discussion of the arrest, search, and seizure matters is desirable, we believe, not only in view of the newly reported case of *John Patrick Henry v. United States,* 80 S. Ct., 168, ... U. S. ...., decided November 23, 1959, but also because we believe clarification of our position with respect to these matters is necessary.

A principal question for determination in this case is whether the conviction can stand in view of the fact that, as we assert, both the search and the arrest, antecedent to arraignment of the appellant, were illegal, and timely mo-

tions to suppress the same were repeatedly made and urged, and, we believe, the record protected in that respect. In order to bring these issues into the sharpest possible focus, a brief review of the chronology is here set out:—

1. According to the testimony of Government witness Deputy Sheriff Gillette, one of the claimed arresting officers testifying on appellant's motion to suppress evidence before Judge Mathis [Rep. Tr. pp. 286, 289-290], the officers "had information from a reliable confidential informant who stated she (Appellant Williams) was selling narcotics from that location (5417½ South Wilton Place, Los Angeles, California), and that she (Williams) was a source of supply for Jewel Bryant." (See Appellee's Br. p. 25).

Deputy Gillette further claimed, in testifying at the trial: "I had information from a confidential informant, from Jesse Thomas, to the effect that Ruth Williams who lived at 5417½ Wilton Place, was engaged in the illegal sale of narcotics." [Rep. Tr. p. 238.]

2. Arguendo, and solely for purpose of analysis, taking the testimony of Government witnesses as if true, we are told that one Justin B. Burley and Malcolm P. Richards, a Federal narcotics agent, appeared on February 24, 1958, before United States Commissioner Theodore Hocke, and made affidavits for search warrant of the premises known as "5417½ South Wilton." (Appendix*, pp. 1-3). The purported search warrants issued by Commissioner Hocke, and thereafter held to be void by Judge Mathes, was delivered then to Federal narcotics officer Malcolm P. Richards, (Appendix, p. 4).

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*"Appendix" used herein refers to the Appendix to Opening Brief of Appellant.

3. Federal narcotics agent Richards and Federal narcotics agent Gilkey, with Deputy Sheriffs Burley and Landry and Gillette, proceeded to the home of appellant Williams at 5417½ South Wilton Place, Los Angeles, California. [Rep. Tr. pp. 473, 539.] Armed with the search warrant, Federal narcotics officers Malcolm P. Richards and William C. Gilkey, accompanied by Deputy Sheriffs of Los Angeles County, Arthur Gillette, A. F. Landry, and William R. Farrington, entered the home and premises of Ruth Williams. There, according to the position taken by the Government, they purported to arrest Ruth Williams, and proceeded to search the premises and seize various objects.

4. From the officers' version of what happened, the officers left Ruth Williams' home about 5:00 on the afternoon of February 24th, taking appellants William and Cook with them. Appellants were taken to the narcotics office in the Federal Building at Los Angeles and detained there for approximately three hours, when they were booked in Los Angeles County Jail on suspicion of trafficking in narcotics.

5. On February 25th, the following day, the officers made their return on the purported search warrant, to which Malcolm P. Richards made affidavit before Commissioner Hocke. That affidavit contains the following sworn statements of Richards, among others (Appendix, p. 5), as follows:

> "I received the attached search warrant 2-24-1958, and have executed it as follows:
>
> On 2-24, 1958, at 3:00 o'clock P. M., I searched (the premises) described in the warrant and
>
> I left a copy of the warrant with Mrs. Ruth J. Williams (name of person searched or owner at place

of search) together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant: (here follows the inventory of the property seized)

* * * * * * *

This inventory was made in the presence of Agent Wm. Gilkey, Sgt. A. F. Landry, Deputy Sheriff and William Farrington & Arthur Gillette, Deputies.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ MALCOLM P. RICHARDS,

Subscribed and sworn to before me this 25th day of February, 1958.

/s/ THEODORE HOCKE,
United States Commissioner."

(Appendix, pp. 4, 5).

6. Therafter, on that same day, February 25th, Malcolm Richards appeared before Commissioner Hocke and swore to a complaint against appellants Williams and Cook, charging them with the sale and facilitation of the sale of heroin [Tr. p. 1].

7. Commissioner Hocke then issued a warrant for the arrest of appellants Williams and Cook, the warrant being directed to the United States Marshal, or other authorized officer.

8. The return on the warrant indicates that someone went over to the County Jail and brought appellants Williams and Cook to the Federal Building to Commissioner Hocke's office, where they were arrested by United States Marshal on February 25, 1958. [P. 2.]

With respect to that sequence, we respectfully submit that this Honorable Court, in determining whether the proceedings shall be sanctioned, should view them in relation to our position taken with respect to these questions:

(a) Where, admittedly, the search and seizure was made "pursuant to the warrant" (Appendix, pp. 4-5) can the validity of the *search* be deemed to rest on anything other than the purported search warrant. We submit that, the latter, being void, the search *necessarily* was without validity, and the proceedings below without validity as well, and reversible. The Government, in view of all the circumstances that is, cannot shift over to the "incident to lawful arrest" basis.

(b) Since the very existence of the colorable search warrant and the use made thereof by the officers, and the affidavit made thereupon in the return thereon by the officers, all commit the Government to the position that their case was taken before the magistrate on February 24th, at which time the void search warrant was issued, can there here by any justification or excuse for *arresting* without a warrant for arrest? The officers obviously had the opportunity to appear before a United States Commissioner (since they did so and received the void search warrant). Such being so, that very appearance before the United States Commissioner negatives any excuse whatsoever for proceeding to make an arrest without a warrant. The arrest, inexcusably without a warrant, thus being illegal, the question must be answered in the negative, the proceedings below necessarily bear the

same stamp of illegality, and reversal is, we respectfully submit, required.

(c) If, rather than depending upon the void warrant for search, the search is to be justified on the basis of it being incident to a supposedly lawful arrest, then is not the Government, now depending upon the arrest rather than upon the void warrant, equally dependent upon a transaction without legal support? We refer to the ground set forth in the preceding paragraph. Accordingly, even were the Government, (committed by the affidavit of the deposing officer Richards in his return on the purported search warrant) able, in legal contemplation, to turn its back on the Richards affidavit and to arrest its search upon the arrest of appellant Williams, the Government thereby would obtain no support for the Government's alternate position. Setting aside the question of probable cause, there was no excuse for the lack of a warrant of arrest, nor any justification for lack of warrant of arrest.

If, indeed, it were held that an arresting officer, as here, may appear before a committing Magistrate, assert probable cause, receive a purported search warrant, and then proceed to make an arrest without a warrant of arrest, we respectfully submit that we would then have the ideal and perfect case to show that the Fourth Amendment to the United States Constitution, as it refers to warrants of arrest, now no longer has any meaning whatsoever.

(d) In view of the manner of entry by the officer, is not the *Miller* Decision, 357 U. S. 305, in fact fatal in itself to the judgment of conviction?

III.

Where, as Here, the Search and Seizure Were Avowedly Made "Pursuant to the Warrant" (See Appendix to Appellant's Opening Brief, pp. 4-5), the Validity of the Search and Seizure Rests Upon the Validity of the Warrant in View of All of the Circumstances; the Warrant Was Here Held Void; the Search Is Therefore Illegal and Reversal Is Required.

As this Court notes on page 13 of the Opinion herein, "the Trial Court held that the search warrant was void on its face." Further, as that opinion shows on page 17 thereof, the Federal narcotics agents are to be deemed "participating" in the search and seizure,—nor is this to be doubted in view of the records below.

For purposes of applicability of the Fourth Amendment to the United States Constitution, a search is a search by a Federal Official, if he has a hand in the search as a Federal enforcement officer, even on the chance that something will be disclosed of official interest to him as such agent.

Waldron v. United States (1955), 219 F. 2d 37, 95 U. S. App. D. C. 66.

Accordingly, the search of the Williams residence was, "a search by a Federal official," for purpose of applicability of the Fourth Amendment.

The early case of *Carroll v. United States,* 267 U. S. 132, 162, "liberalized the rule governing searches, when a moving vehicle is involved. . . ."

John Patrick Henry v. United States, 80 S. Ct. 168, ... U. S. ...., decided November 23, 1959.

However the *Carroll* case did not eliminate the need, in addition to probable cause, for justification for lack of a warrant. Not only must probable cause be present, but, as well, there must be some excuse or justification for the officer to proceed without warrant. That this is the law. Out of the essence of the Fourth Amendment, is further indicated from cases decided long after Carroll.

Jones v. United States, 78 S. Ct. 1253, 1256, 1257, 357 U. S. 493, 496-500 (decided June 30, 1958).

"Although it must be recognized that the basis of the two lower court decisions is not wholly free from ambiguity, a careful consideration of the records satisfies us that the search and seizure were considered to have been justified because the officers had probable cause to believe that petitioner's house contained contraband materials which were being utilized in the commission of a crime, and not because the search and seizure were incident to petitioner's arrest. So viewed, the judgments below cannot be squared with the Fourth Amendment to the Constitution of the United States and with the past decisions of this Court.

It is settled doctrine that probable cause or belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant. *Agnello v. United States* 269 U. S. 20, 33, 46 Sup. Ct. 4, 6, 70 L. Ed. 145, *Taylor v. United States,* 286 U. S. 1, 6, 52 S. Ct. 466, 467, 76 L. Ed. 951. The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy. See, e.g. *Johnson v. United States,* 333 U. S. 10, 14, 68 Sup. Ct. 367,

369, 92 L. Ed. 436; *McDonald v. United States,* 335 U. S. 451, 455, 69 Sup. Ct. 191, 193, 93 L. Ed. 153; *cf. Giordenello v. United States,* 357 U. S. 480, 78 Sup. Ct. 1245. This purpose is realized by Rule 41 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., which implements the Fourth Amendment, but by requiring that an impartial magistrate determine from an affidavit showing probable cause whether information possessed by law enforcement officers justifies the issuance of a search warrant. Were Federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases and the protection it affords largely nullified.

The facts of this case impressively bear out these observations, for it is difficult to imageine a more severe invasion of privacy than the night-time instrusion into a private home that occurs in this instance. . . ."

Thus the *Jones* case directly refutes the proposition that a search without a warrant can be based merely upon probable cause, and places its grounds squarely upon the Fourth Amendment to the United States Constitution.

Clearly, in the instant case, there was no necessity or justification, within the Rule here reviewed, for a search of appellant's premises without a warrant, for there was the uncontrovertable opportunity to get a warrant. The officers had been before the magistrate to get a search warrant. Albeit void, the invalid warrant forecloses any justification for search without warrant.

We submit that this Court ought not to credit the Government's contention that, in spite of Officer Richard's affidavit constituting a representation by that Government officer to the magistrate, the search was based upon the assertedly previous arrest.

A similar approach was attempted in the *Jones* case. There, a valid search warrant had expired, and arrest was made and search was thereupon claimed to be incident to the arrest. Not supported by the search warrant, the Government wavered between *Scylla* and *Charybdis,*—between a claim of search—based—on—lawful—arrest, and unjustified search—without—warrant. Said the Court:

> "These contentions, if open to the Government here, would confront us with a grave constitutional question, namely, whether the forceful night-time entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant for it could not have been sought, is consistent with the Fourth Amendment. . . ."
>
> *Jones v. United States,* 78 S. Ct. 1253, 1257, 357 U. S. 493, 500.

The very obtaining of a void search warrant precludes the Government from claiming any legality to the search on other purported grounds.

IV.

The Existence of the Void Search Warrant and Its Procurement by the Officers, and the Affidavit They Made Thereupon in the Return Thereon by the Officers, Show the Government's Position That Their Case Had Been Taken Before the Magistrate on February 24th, and Thus Shows the Full Opportunity to Procure the Same, or a Warrant of Arrest: There Can Be No Justification or Excuse for Arresting Without Warrant for Arrest; the Arrest Accordingly, Is Illegal.

The arrest, claimed by the Government to have occurred on February 24th, and leading to Federal prosecution, and in which Federal officers participated, must meet the tests of the Fourth Amendment to the United States Constitution.

Waldron v. United States (1955), 219 F. 2d 37, 95 U. S. App. D. C. 66;

Giordenello v. United States, 78 S. Ct. 1245, 357 U. S. 480.

Neither *Carroll,* nor *Rubinowitz,* are in point. *Carroll v. United States, supra,* "Liberalized the rule governing *searches* when a moving vehicle is involved. . . ." (Emphasis added.) *Henry v. United States, supra.* In *United States v. Rabinowitz,* 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed 653, the arrest was made on a valid warrant, and is of no moment here.

Nor is *Draper* in point. There, the arrest without a warrant was made when the defendant was seen to "alight from an incoming Chicago train and start walking 'fast' toward the exit . . . carrying a tan zipper bag. . . ." Assuming probable cause, the necessity

for immediate arrest was obvious, since the defendant was moving and was about to disappear. There was obviously no opportunity to get a warrant to arrest. *Draper v. United States,* 79 S. Ct. 329.

In the instant case, however, there was, as noted above, every opportunity to get a warrant. Indeed, preparations were avowedly extensive and long-planned. And here, more over, the appellants were in a dwelling place, as in *Jones v. United States, supra.* And, as Justice Douglas noted in *Henry v. United States, supra,* the *Carroll* case merely liberalized the rule governing searches when a moving vehicle is involved.

The recent case of *Giordenello v. United States,* 78 S. Ct. 1245, 357 U. S. 480, decided June 30, 1958, aligns itself with the rule requiring justification in addition to probable cause, and shows that that rule applies to arrests, just as much as to searches.

> "Petitioner was convicted of the unlawful purchase of narcotics . . . When petitioner left this residence, carrying a brown paper bag in his hand, and proceeded toward his car, Finley (agent of the Federal Bureau of Narcotics) executed the arrest warrant and seized the bag, which proved to contain a mixture of heroin and other substances. . . . Prior to trial, petitioner . . . moved to suppress for use as evidence the heroin found in the bag. In this Court, petitioner argues, as he did below, that Finley's seizure of the heroin was unlawful, since the warrant of arrest was illegal and the seizure could be justified only as incidental to a legal arrest, and that consequently the admission of the heroin into evidence was error which required that his conviction be set aside . . .

"Criminal Rules 3 and 4, provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth 'the essential facts constituting the offense charged," and (2) showing "that there is probable cause to believe that (such) an offense has been committed and that the defendant has committed . . .'. The provisions of these Rules must be read in light of the Constitutional requirements they implement. The language of the Fourth Amendment, that " . . . no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing . . . the persons or things to be seized. . . ." of course applies to arrest as well as search warrants. See *Ex Parte Burford,* 3 Cranch, 448, 2 L. Ed. 495; *McGrain v. Daugherty,* 273 U. S. 135, 154-157, 47 S. Ct. 319, 323, 71 L. Ed. 580. The protection afforded by these Rules when they are viewed against their Constitutional background, is that the inference is from the facts which lead to the complaint '. . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States,* 333 U. S. 10, 14, 68 S. Ct., 367, 369, 92 L. Ed. 436."

Giordenello v. United States, 78 S. Ct. 1245, 1249-1250, 357, U. S. 480, 485, 486.

(It should be noted invalidity of the warrant was an ultimate basis for the Decision reversing the conviction in the *Giordenello* case.)

We submit that the Rule requiring (in addition to probable cause) justification for the lack of a warrant, ap-

plies equally to arrests as to searches. A summation of the cases reveals that this is the rule; it appears most clearly in the most recent cases. The requirement is Constitutional, and, it goes without saying, controls the construction of any statutory implementations.

V.

The Search, Claimed to Be Incident to the Arrest, Is Immediately Without Legal Support; Reversal Is Thus, We Submit, Required.

Thus, the arrest transaction claimed by the Government to have occurred on February 24th lacks justification, collides with the pronouncements of the *Henry, Jones* & *Giordenello* cases (we mention cases decided in 1958 and 1959), and is illegal. The arrest, on which the search is said to depend, is itself unexcused. This reminds us of the *Jones* case, *supra*:

> ". . . The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy . . ."
>
> *Jones v. United States,* 78 S. Ct. 1253, 1256, 357 U. S. 493, 496.

In any case, argument is not here required, we believe, that if the arrest is unlawful, it cannot support the search, the fruits of which are admitted into evidence over objection. We respectfully submit that reversal is indicated.

VI.

In View of the Manner of Entry by the Officers, We Contend That the Miller Decision Is in Fact Fatal in Itself to the Judgment of Conviction.

We respectfully submit that *Miller v. United States,* 78 S. Ct. 1190, 357 U. S. 566, invites reappraisal of its relation to this instant case.

As the Opinion of this Court in this matter states:

> "The officers entered the home of Mrs. Williams through the shut, but unlocked door, after knocking and receiving no response. When Mrs. Williams appeared, she was placed under arrest by a State officer, for violating the Federal Narcotics Laws. The lawfulness of the arrests of appellants, depends upon the power of arresting officer to enter the home of Mrs. Williams through an unlocked door, after knocking for several times and receiving no response, in order to arrest without warrants, persons whom the arresting officer had probable cause to believe were violating the Federal Narcotics Laws.
>
> The Federal Narcotics Officers *participating* in the enterprise had such authority under Title 26, U. S. C. A., Sec. 7607. . . ." (P. 17).

It was earlier noted, according to *Waldron v. United States* (1955), 219 F. 2d 37, 95 U. S. App. D. C. 66, "That a search is a search, by a Federal official, if he has a hand in the search as a Federal Enforcement Officer, even on the chance that something will be disclosed of official interest to him as such agent. It should be further noted that the criteria set forth in 18 U. S. C. A. Sec. 3109, and in California Penal Code Sec. 844, are substantially the same.

The Miller opinion states:

"Whatever the circumstances under which breaking a door to arrest for felony might be lawful, however, the breaking was unlawful where the officer failed first to state his authority and purpose for demanding admission. The requirement was pronounced in 1603 in *Semayne's* case, 5 Coke, Co. Rep. 91 a, 11 Erc. 629, 677 Eng. Repr. 194, at 195: 'In all cases where the King and his party, (the sheriff if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . .' (The emphasis was supplied by Mr. Justice Brennan, speaking for the majority of the Court.)

Miller v. United States, 78 S. Ct. 1190, 1195, 357 U. S. 301, 309 (decided June 23, 1958.)

The Miller decision continued:

"The requirement stated in *Semayne's* case still obtains. It is reflected in 18 U. S. C. Sec. 3109, 18 U. S. C. A. Sec. 3109, in the statutes of a large number of States (here Justice Brennan, in footnotes, lists, among others, California Penal Code, Sec. 844), and in the American Law Institute's proposed Code of Criminal Procedure, Sec. 28. It applies, as the Government here concedes, whether the arrest was to be made by virtue of a warrant, or when officers are authorized to make an arrest for a felony without a warrant. . . ."

The opinion then refers to certain exceptional circumstances, which may excuse compliance, none of which, we believe, are applicable here. The opinion then continues,

> "The burden of making an express announcement is certainly slight. A few more words by the officers would have satisfied the requirement in this case . . . But first, the fact that petitioner attempted to close the door did not of itself prove that he knew that the purpose was to arrest him. It was an ambiguous act . . ."

The majority opinion concludes:

> ". . . The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized, should have been suppressed. "Reversed."

The fact that the Miller decision indicated that the manner of arrest was unlawful under the District of Columbia, and thereupon reversed the conviction, is, we believe, authority for the proposition that where State and Federal Officers act in concert, the local law may create a *further* burden impressed upon the arresting officers; the reverse of this, however, we do not believe is true. If it is deemed that the local requirements are less burdensome than the Federal requirements, (as shown above, California requirements are similar) this does not, *ipso facto,* relieve the arresting officers of the burdens of the Federal requirements. Rather, we contend, in accordance with authorities cited above, that the burdens of Federal law remain, and impress themselves upon the arresting officers. The requirements of *Miller v. United States,* based as they are upon Federal as well as other authorities, extend to the

case at hand, and require a finding, we respectfully submit, that the manner of the arrest was itself unlawful; wherein all deference submit that its execution, in violation of the Rule stated in *Miller v. United States,* requires reversal, as was done in *Miller v. United States, supra.*

VII.

Appellants Suggest in Accord With Rule 23 of This Court, That a Rehearing Should Be Granted and That the Case Should Be Reheard En Banc.

Accordingly, and for each of the reasons stated herein, and as well for reasons stated in earlier briefs to this honorable Court, it is most respectfully contended, by these appellants, that the search and seizure were invalid, that the evidence introduced constituting the fruits thereof make the conviction reversible, that the search cannot find support in the asserted arrest, (since that in itself was necessarily unjustified), and that the manner of arrest itself was illegal to an extent itself, we most respectfully submit, requiring reversal.

For these reasons, we respectfully suggest to this Honorable Court that a rehearing should be granted and further suggest that the case be reheard *en banc.*

It is our contention that grave Constitutional questions here exist that might well justify the Court to order such a rehearing on the issues of this case.

Respectfully submitted,

WM. H. NEBLETT,
GERALD H. GOTTLIEB,
E. W. MILLER,
Counsel for Appellants.

Certificate of Counsel.

WM. H. NEBLETT, and GERALD H. GOTTLIEB, counsel herein for Appellants, certify that in their judgment, the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

WM. H. NEBLETT,

GERALD H. GOTTLIEB,